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February 7, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 96-197

Dear Mr. Caton:

On behalf of Malrite Communications Group, Inc., there is transmitted herewith and filed an original and nine (9) copies of its "Comments" with regard to the Notice of Inquiry released October 1, 1996.

Should there be any questions concerning this matter, kindly communicate directly with the undersigned.

Very truly yours,

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP

By: 

Bruce A. Eisen

Enclosure

WASHINGTON, D.C. 20554

In the Matter of)
)
Newspaper/Radio Cross-Ownership) MM Docket No. 96-197
Waiver Policy)

COMMENTS OF MALRITE COMMUNICATIONS GROUP, INC.

In its NOI, the Commission addresses its current rule that prohibits the common ownership of commercial broadcast stations and newspapers in the same community, observes that it has granted very few permanent waivers since the rule was first adopted in 1975, and further notes that the Walt Disney Company and Capital Cities/ABC, Inc. merger has prompted it to examine the question of waivers of the newspaper/radio cross-ownership rule as it applies to radio stations. Since the Commission has

acknowledged that there may be markets in which a waiver of the cross-ownership restriction could result in enhanced diversity, it now solicits comments to include whether or not waivers of the rule would likely increase the dissemination of news without adversely affecting competition. In particular, the commission asserts that a new policy might be based upon, inter alia, the number of "voices" that would remain in a market after the sale of a facility which had implicated the cross-ownership rule.

Malrite submits these comments in order to address certain concerns as broadcasters attempt to conform to the Telecommunications Act, FCC ownership restrictions, and heightened scrutiny by the United States Department of Justice. Malrite urges that for purposes of administering waivers of the newspaper/radio cross-ownership rule, all significant media within a market should be counted in assessing the number of independent voices. Moreover, the fact that such media may transcend issues of local diversity which is at the heart of the rule, should not diminish the number of or the nature of media to be counted in the regulatory mix. Indeed, Malrite believes that a realistically broadened panoply of media outlets should be included in any determination of questions that involve concentration of control.

It is not Malrite's purpose to urge First Amendment concepts beyond what have been advanced in the past. It is sufficient to note that for many years the Commission and the Courts have recognized an enlarged marketplace undreamed of in 1975 when the Commission first adopted its newspaper/radio cross-ownership rule. Historically, since Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), the Commission has relied upon a spectrum scarcity argument to justify restrictions in the ownership of broadcasting facilities. But the mercurial nature of technology and the ever increasing need to serve consumers have transformed the media marketplace of a generation ago into an expansive arena of informational and entertainment choices which has already begun to displace the traditional daily newspaper as the primary source of information.

Over the years, the Commission has identified a number of media alternatives which have significantly increased the prospect of competition for information and entertainment and which are largely derived from emerging technologies.¹ A reasonable roster of media would include the following:

¹ See, e.g., Annual Assessment of the Status of Competition on the Market for the Delivery of Video Programming, CS Docket No. 95-61, 11 FCC Rcd 2060 (1995). See, also, Measurement of Concentration, Staff Report, Office of Plans and Policy, December 23, 1982.

1. cable television,
2. multi-point distribution service,
3. UHF and VHF television,
4. AM and FM radio,
5. direct broadcast satellites,
6. newspapers,
7. magazines,
8. low power television,
9. video cassette and video disc players, and
10. computer services, including web pages and on-line services,
11. direct mail,
12. telephone yellow pages,
13. outdoor advertising,
14. motion picture advertisements on the actual screen.

The growth of content-oriented technologies reduces the prospect of a concentration of control that would be inimical to the public interest. Moreover, the universe of information choices which have become available results in a conclusion that all significant media in a particular market must be considered in determining whether a particular transaction carries with it the

potential to stifle a diversity of ideas. For purposes of determining whether a waiver of the newspaper/radio cross-ownership rule is justified, the test should implicate not only the sum of radio and television voices in the market, but other significant media, as well. Hence, the number of independent market voices that would remain after a waiver of the rule should not be measured simply by the resultant number of radio and television stations but, rather, by the entire mix of media outlets in the area.

A given market includes much competition, and economists often classify "market power" as either a structural or a performance measure. However, a third measure that can be utilized is a routine count of the number of independent outlets available in a given geographic area. By simply counting the alternatives one can perceive which media services are substitutes for conventional broadcast outlets as well as the geographic scope of the relevant market. In determining questions of concentration of control, a very small number of outlets may be sufficient to neutralize an ownership problem. For instance, the Commission has ruled that divestiture of newspaper/radio or television/newspaper combinations was not required where only two major independent voices were available

in the local community. See, Second Report & Order in Docket No. 18110, 50 FCC 2d 1046 (1975).

It is a Commission mandate to encourage the widest possible range of media ideas to serve the public and to therefore provide a broad choice of informational outlets. See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); 99 U.S. App. D.C. 369, 240 F.2d 55 (1956). If a particular media source has the potential to reach a consumer, it should be considered a diversity enhancing source of information and/or entertainment. To fail to consider the full latitude of the media listed, supra, is to reject real world forces and the benevolent advance of technology as the 20th century draws to a close.

From the point of view of local consumers, the cable system adds much more diversity than does a single television station. Thus, counting a cable system in the same manner as a television station under-estimates the likelihood of diverse ideas getting through to the public. From the point of view of competition in the advertising market, the greater capacity of a cable system vis-a-vis a television is important. Much the same can now be said for DBS and even for computer services such as the Internet.

The Commission must, of course, foster the goal of diversity of viewpoint as well as economic competition. It should insure

that no single enterprise is able to exert such power as to limit the ideas offered to the public. There is, however, another side to the equation. The Commission must gauge the level of diversity which best serves the public interest, and the product must result in the delivery of information as well as entertainment into a consumer's home. This clearly encompasses commercial and non-commercial VHF and UHF television signals, subscription video programming which can be provided by cable, STV, MDS, SMATV, DBS or LPTV, motion picture theater, video cassette and disc equipment and, of course, home computers. Added to this mix are non-video information sources such as AM and FM radio, and the print media. A narrowly argued definition of "market" which would exclude alternative media would grossly underestimate actual competition.

The Commission should consider a more broadly defined information and entertainment market and thereby take into account all these services as it considers questions of concentration of control at the edge of the 21st century. It is virtually impossible to quantify each media source, so it is suggested that an ad hoc approach be taken when counting the number of media outlets available within a given geographic area. The local market is the geographic unit that must be used to

examine competitiveness in broadcasting, and that market -- together with all available media -- must be determined in analyzing multiple ownership and concentration of control restrictions. Even if a large number of "national" or "regional" channels become available through DBS and other emerging technologies, the competitiveness within the local market should remain important in meeting the need to provide information of purely local interest. However, that media which is regional or nationwide (DBS, for example), should still be considered because the exchange of ideas and the provision of information through such outlets will be relevant to local areas everywhere since the explosion of media technologies, for better or worse, has tended to homogenize our communities. The Commission should also consider the size of the market and the number of independent alternatives rather than adopting a numerical approach that cuts across all markets. If all television channels, all newspapers, all radio stations and all cable systems constitute independent voices, and if allowance is made for the availability of other media, then it is likely that only the smallest markets will be deemed non-competitive as a result of certain acquisitions. Restrictions on ownership should therefore apply only to those markets judged insufficiently competitive.

There has been a spectacular explosion of media outlets with resulting informational voices that compete in any given marketplace, and there is no reason to believe that an abundance of yet newer technologies will develop in the future. Moreover, the proliferation of media, both electronic and otherwise, diminishes the once vital concept of spectrum scarcity as a standard of concentration of control. The various media set forth, supra, all have currency in the American marketplace, and a number of those media identified do not depend upon available spectrum. This latter category furthers competition and surely negates the objectionable concentration of control that has, in the past, restricted broadcast transactions. Indeed, it appears that the Department of Justice has failed to evaluate such considerations in determining whether or not broadcasting transactions implicate United States antitrust law. Perhaps as a result of this NOI and further experience with the Telecommunications Act, the Commission may be able to educate that department and thereby bring more certainty to broadcast regulation.

No matter what media market we may inhabit, we are confronted with an almost dizzying array of sources from which we can gain both entertainment and information. An argument can be

made that the explosion of media outlets is a defining factor of the last quarter of the 20th century. There may continue to be arguments for ownership restrictions, but the aggregate of media outlets should be a major consideration by the Commission and by the Department of Justice in attempting to ascertain whether or not such concentration of control exists in a given market that might justify the rejection of a broadcast acquisition.

All media, including at least those identified in these comments, should be addressed when a marketplace is defined for purposes of the cross-ownership rule and for other matters relating to concentration of control.

Respectfully submitted,

MALRITE COMMUNICATIONS GROUP, INC.

By: 

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February 7, 1997

CERTIFICATE OF SERVICE

I, Toni R. Daluge, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, LLP, do hereby certify that on this 7th day of February, 1997, a copy of the "Comments of Malrite Communications Group, Inc." was sent via United States mail, postage-prepaid to the following:

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Toni R. Daluge

* Via Hand Delivery